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IN THIS ISSUE

RUTH V. GLICK

MS. GLICK IS A FULL TIME ARBITRATOR AND MEDIATOR WHOSE KNOWLEDGE AND SKILL OF ADR DERIVES FROM HER BACKGROUND AS A LAWYER, BUSINESSWOMAN, AND EDUCATOR. SHE HAS OVER 20 YEARS EXPERIENCE AS A DISPUTE RESOLVER IN BOTH HER LEGAL AND BUSINESS CAREERS AND HAS BEEN ADJUNCT PROFESSOR OF ARBITRATION AND ADR LAW AT THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW FOR THE PAST TEN YEARS.

WAS IT MEDIATION OR ARBITRATION? BE SURE EVERYONE IS ON THE SAME PAGE

RUTH V. GLICK

Parties in commercial litigation frequently seek a resolution process that fits the needs of their particular dispute. They could first try mediation, a nonbinding, and informal process in which a knowledgeable and neutral third party, who has no authoritative decision-making power, assists parties to negotiate and voluntarily resolve their dispute by reaching a mutually acceptable agreement. Usually the mediator's function is to only facilitate negotiations but they are sometimes called upon to render evaluations of the case. Or the parties could agree to arbitration, a more formal adjudicatory system of dispute resolution where, by agreement, they submit a controversy to a neutral third party or panel for a binding decision. When the two processes merge, however, the parties need to be sure they are on the same page. They need to agree by stipulation the power and authority of the third party neutral.

Several California cases demonstrate what happens when parties do not agree on the process they have chosen. *Weddington Productions v. Flick* (1998) 60 Cal.App.4th 793, illustrates how an ADR procedure can go awry. A dispute arose

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FAMILY FARMER BANKRUPTCY AND THE NEW BANKRUPTCY LAW: CHAPTER 12 WILL BE MORE USEFUL TO CALIFORNIA FARMERS

RILEY C. WALTER

Effective October 17, 2005, major changes have been made to bankruptcy law. While many perceive that the changes affect only consumer petitioners, there are major changes that affect businesses and agricultural cases falling within the scope of Chapter 12. The changes are primarily in two areas—amendments to the eligibility requirements for Chapter 12 filing and modification of the income tax treatment of gains on property liquidated in connection with a Chapter 12 case, the chapter that is specific to family farmers.

Eligibility Requirements

There are a number of significant features of the new law affecting agricultural cases. One such change is that the new law makes Chapter 12 bankruptcy permanent as of July 1, 2005, ending the series of short extensions that were granted over the past several years. The new law also extends the provisions of Chapter 12 to a

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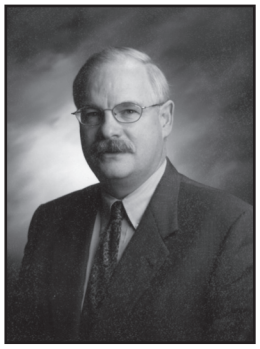

RILEY C. WALTER

MR. WALTER IS AN ATTORNEY WITH WALTER LAW GROUP IN FRESNO, CALIFORNIA (WWW.WALTERLAWGROUP.COM). HE IS THE FORMER CO-CHAIR OF THE STATE BAR AGRI-BUSINESS COMMITTEE, A CERTIFIED BUSINESS BANKRUPTCY SPECIALIST BY THE AMERICAN BOARD OF BANKRUPTCY CERTIFICATION AND A FELLOW OF THE AMERICAN COLLEGE OF BANKRUPTCY. HE SPECIALIZES IN FARM, RANCH AND AGRIBUSINESS CASES.

The State Bar of California
180 Howard Street
San Francisco, CA 94105
(415) 538-2341
www.calbar.ca.gov

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when Stephen Flick, a sound editor, and another employee, left Weddington Productions to form a new company. Weddington obtained an injunction against Flick to prevent him from using any effects from a library of recorded sounds, such as guns firing, doors slamming, helicopters hovering, etc. suitable for use in movie production. The parties then stipulated to voluntary mediation in an agreement which said the parties would "formalize" additional terms later.

The parties participated in a 12-hour mediation session before a retired judge and signed a "Deal Point Memorandum" which signified certain agreed terms relating to all litigation pending between the parties and indicated that the parties would formalize a licensing agreement at a later date. The Memorandum also included an Alternative Dispute Resolution ("ADR") clause which provided that all parties agreed the settlement was enforceable under Code of Civil Procedure section 664.6 and reserved jurisdiction in the private judge to resolve any dispute that might occur in the documentation of a full settlement agreement or licensing agreement.

While the reference to section 664.6 suggests that the parties thought they formed a settlement contract, their subsequent inability to agree on the material terms of the licensing agreement quickly disabused them of that notion. Weddington contended that reference to section 664.6 empowered the private judge to select licensing agreement terms and impose them on the parties. Flick thought otherwise. And in the post-Deal Point Memorandum ADR proceedings, the private judge stated the goal was to produce an agreement that would "go around the table for signature," thus suggesting a continuing mediation. (*Id* at p. 802.)

However, Weddington continued to insist that the proceedings were an enforcement motion pursuant to section 664.6 which empowered the private judge to select terms of the licensing agreement. The judge then, apparently agreeing with Weddington's characterization of the process, proceeded to select and impose binding resolutions, whether agreed to or not by both parties. Flick continued to maintain that the proceedings were a continuation of the mediation and that the private judge had no power to impose licensing agreement terms. It is at this point, the appellate court later noted, that the private judge ceased to act as a mediator, and embarked upon a role similar to that of judge or arbitrator, overruling objections by the Flick parties and making rulings about what terms the licensing agreement would contain. (*Id* at p. 803.)

The private judge encouraged the parties to continue discussions and allowed them to do so without Flick waiving his contention that it was a voluntary mediation. Eventually, however, Flick withdrew from the proceedings. Weddington and the private judge continued discussions without him and the judge eventually issued an order upholding the settlement agreement. Flick made a motion in superior court to enforce the Deal Point Memorandum alone while Weddington moved to enforce both the Deal Point Memorandum and the private judge's subsequent orders crafting the licensing terms. The superior court granted Weddington's motion despite noting that Flick had not agreed to the terms in the private judge's order.

The appellate court reviewed the matter and observed that the one-page Deal Point Memorandum turned into a 35-page judgment, including a licensing agreement containing material provisions never agreed to by Flick. The court reasoned that even though Weddington and Flick agreed to the words "licensing agreement" and "fully paid up license," the record showed there was never any meeting of the minds, either subjectively or objectively, as to exactly what these words meant. Therefore, the evidence supported the notion that the Deal Pont Memorandum did not constitute an enforceable contract.

The court also held that section 664.6 did not authorize the private judge to create material terms of a settlement as opposed to deciding what terms the parties themselves had previously agreed upon. While a private judge or other ADR neutral could have theoretically been empowered to do what he did in arbitration, the parties had not agreed to arbitration either by oral stipulation or by a signed agreement. Since there was no signed writing by the parties setting forth the terms of the licensing agreement, the court refused to enforce the private judge's order, thereby declining to enforce any purported settlement agreement pursuant to Code of Civil Procedure section 664.6.

This case summary is a long way of demonstrating that parties need to fully agree and understand which process or what combination of dispute resolution processes they are engaging in and memorialize it in writing. In *Weddington,* the parties started with a voluntary mediation process and ended with an adjudicatory order, a process which was not agreed upon by both sides either before or during the dispute resolution procedure. The result would have been upheld had the parties agreed in writing to a mediation/arbitration hybrid process where the same neutral would mediate the dispute and then arbitrate any unresolved matters. But this was not agreed upon by the parties and the trial court order was reversed and remanded to the lower court.

Another dispute resolution process which did not receive court endorsement was the one at issue in *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261. When Kathleen Dent was discharged from her employment by The Farmers Insurance Group, she was entitled to a review of her discharge by a three-member termination review board composed of an agent selected by the terminated agent, an agent chosen by the regional manager or his or her representative, and a third party mutually selected by the other two members. The board was empowered to convene and submit a summary of the hearing and its recommendations to the chief executive officer who would review the recommendations and reach a decision. When a retired judge, Philip M. Saeta, the third member selected by the other two review board members, petitioned the court to vacate its order granting a motion to compel his deposition testimony, the issue before the court was whether the statements made during the review were privileged and protected by Evidence Code section 703.5 (protecting the ADR neutral from testifying in subsequent civil actions) and Evidence Code section 1119 (a broad confidentiality statute preventing the admissibility of any evidence prepared for a mediation in any other civil action).

The court quickly concluded that the termination review proceeding, which had no neutral third-party decision maker to render a final and binding decision, and in which two members of the three-person review panel were employed by the company, was not arbitration. It also concluded, since there was no negotiation or settlement efforts and no voluntary or mutually accepted result, it was not mediation. As a result, neither confidentiality statute applied and the retired judge could be deposed.

However, the court did go out of its way to note that mediation can be evaluative as well as facilitative. The court distinguished between classic mediation (where the mediator meets with the parties to facilitate negotiations and is passive expressing neither judgment nor opinion on the merits) and evaluative mediation (described as a voluntary settlement conference with attorneys present where the mediator takes a more active role often expressing an opinion on the merits without authority to reach a decision). (*Saeta v. Superior Court, supra,* 117 Cal. App.4th at pp. 269-270.)

Can an evaluative mediation go too far? In *Travelers Casualty and Surety Company v. Superior Court* (2005) 126 Cal. App.4th 1131, a case which arose out of mediation between the Roman Catholic Diocese of Orange, its insurers and plaintiffs alleging past sexual abuse, the issue was whether a settlement judge had exceeded his authority by giving a valuation of the case and issuing legal findings. The court relied on *Saeta's* distinction of classic and settlement conference mediation (commonly referred to as facilitative and evaluative mediation) but emphasized that in both cases the parties' self-determination is to be respected without coercion from the mediator.

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After the valuation hearing, the private judge issued an order showing his reasonable settlement value of the case and included findings that would be used to prevent insurers from avoiding liability in the future. The court said the private judge exceeded his authority by having "anticipatorily adjudicated certain legal issues that were not properly before him." (*Travelers Casualty and Surety Company v. Superior Court, supra,* 126 Cal. App.4th at 1142.) By making factual findings and precluding a declaration of coverage forfeiture by the insurers, the judge's actions were binding factual determinations for which he had no authority and were coercive. The valuation order was then vacated by the court.

The court noted that the private judge had not erred by providing the parties and insurers with his evaluation of the plaintiffs' prospects for victory or the reasonable settlement value of their cases. But, by characterizing the valuations as findings, by purporting to make other findings concerning actual trial requirements for insurers, and determining whether conduct was in bad faith, he overstepped his authority as a mediator.

As parties create customized processes to resolve disputes, and in their enthusiasm combine the characteristics of one process with another, without an agreement in writing defining the powers of the neutral, they run the risk of subsequent court challenges. While it is perfectly proper to engage in clearly defined hybrid processes, it is only appropriate to do so when agreed to in writing. So remember, when drafting these stipulations, or pre-dispute resolution clauses, make sure everyone is on the same page. ■